Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Canadian Union of Postal Workers,

applicant,

and

Canada Post Corporation; RMS Pope Incorporated,

respondents.

Board File: 27029-C
Neutral Citation: 2013 CIRB 672
January 28, 2013

The Canada Industrial Relations Board (the Board) was composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. Patrick Heinke and Norman Rivard, Members.

Appearances

Messrs. Jean-Marc Eddie and Joël Dubois, for the Canadian Union of Postal Workers;

Messrs. John D.R. Craig and Michael S. Smyth, for Canada Post Corporation;

Mr. Thomas A. Stefanik, for RMS Pope Incorporated.

I–Background

[1] On August 8, 2008, the Canadian Union of Postal Workers (CUPW or the union) filed an application with the Board pursuant to section 35 of the *Canada Labour Code* (*Part I Industrial Relations*) (the *Code*) seeking a declaration that Canada Post Corporation (CPC) and RMS Pope Incorporated (RMS Pope) are a single employer for the purposes of the *Code*. This application

was consolidated with three similar section 35 applications then pending before the Board, bearing Board file nos. 26935-C (TLM Logistics/JCE Logistics, Oshawa), 26936-C (Eazy Express, Owen Sound) and 27028-C (Super Express, Fredericton).

[2] CPC raised a preliminary objection to the Board's jurisdiction to hear the applications. A hearing with respect to this objection was held on January 16, 2012. Following the hearing and by agreement, the parties submitted written arguments. The Board issued a bottom-line decision on February 29, 2012, in which it found that it did have jurisdiction to entertain the union's section 35 applications. Reasons for that decision, *Canada Post Corporation*, 2012 CIRB 635 (*CPC 635*), were issued on March 9, 2012.

[3] During the course of the Board's proceedings, Eazy Express and Super Express lost their respective contracts with CPC. On April 30, 2012, the Board determined that the union's applications involving those companies were moot and therefore closed those files (*Canada Post Corporation*, 2012 CIRB LD 2787). On October 30, 2012, the union withdrew the application involving TLM Logistics/JCE Logistics (Board file no. 26935-C). Consequently, this decision deals only with CUPW's application for a declaration of single employer involving CPC and RMS Pope.

[4] The Board heard the parties with respect to the merits of the union's application on May 9 to 11, October 30 to November 1, and November 15, 2012.

II–Facts

[5] CPC is a federal Crown corporation created in 1981 that is responsible, pursuant to the *Canada Post Corporation Act*, R.S.C. 1985, c. C-10 (the *CPC Act*), for providing services for the collection, transmission and delivery of messages, information, funds and goods both within Canada and between Canada and places outside Canada. To carry out this mandate, CPC employs more than 60,000 employees in a variety of capacities. It also enters into contracts with external service providers (contractors) for certain activities, including highway services (HS) and combined urban services (CUS), and has done so for decades. The *CPC Act* recognizes the existence of these mail contractors, and defines them in section 2(1) as "...a person who has

entered into a contract with the Corporation for the transmission of mail, which contract has not expired or been terminated."

[6] The CPC network consists of mechanized plants, distribution centre facilities (DCFs) and local post offices. There are some 130 national "lanes" or routes and 1,060 regional routes through which mail is transferred between the plants, DCFs and local post offices. The transportation of mail between the plants, DCFs and local post offices is undertaken by HS contractors; there are no CPC employees who perform this work. With respect to the national contracts, the mail is loaded on and unloaded from the vehicles by CPC employees who are CUPW members. However, regional HS workers load and unload their own vehicles.

[7] Tenders for HS contracts are very detailed. Schedule A of each Invitation to Tender document specifies not only the exact delivery and pick up time for each stop along each route, but also the type of vehicle required, the age of the vehicle and the equipment that must be provided by the contractor. Contractors are required to obtain security clearances (criminal record checks) for any employee who has access to the mail or CPC's property or equipment. Schedule A of the Invitation to Tender is subsequently incorporated into the final contract that CPC enters into with the successful bidder.

[8] In total, CPC contracts with some 600 to 800 different contractors to cover the HS routes. The contractors vary from large national or international trucking companies to small sole operators. The class of vehicles used depends on the requirements of the route, from 53 foot tractor trailers to small cargo vans. Depending on the contract, the contractor may be remunerated on an invoice (volume) basis or on a fixed, recurring payment basis. The contractor may incur a loss if it has underbid the contract or if expenses increase unexpectedly. Other than a formula for increases in fuel prices and ad hoc or overload runs, a contractor has no ability to pass on increased costs to CPC. The average length of an HS contract is five years and, since 2005, 70% of HS contracts have been renewed with the same contractor.

[9] CUS contracts involve the delivery of mail and parcels between local post offices and retail outlets, relay boxes and/or street letter boxes. In this regard, the work is similar, although not identical, to that performed by Mail Service Couriers (MSCs), who are Canada Post employees. MSCs are members of the bargaining unit represented by CUPW. In locations where CPC

employs MSCs, there are no CUS contractors and vice versa. The CUS Invitations to Tender and final contracts are extremely detailed. CPC specifies the vehicles that are to be used, and the work schedules. The contractor trains and assigns the workers it hires, but must comply with CPC's requirement that its employees maintain dress and grooming standards, including wearing a uniform. The only equipment and training provided by CPC is a hand-held scanner (PDT) used to document the movement of letters and packages. Should the timing of their route require it, CUS workers have access to the keys to certain CPC facilities.

[10] Nationally, there are some 200 CUS contracts with approximately 108 different CUS contractors. The average length of a CUS contract is five years and, since 2005, only 58% of incumbent contractors have had their contracts renewed. In many cases, this is because the incumbent decided not to bid on the retender. In other cases, it was because another contractor made a lower bid and was successful in displacing the incumbent.

[11] RMS Pope is a family-owned, Newfoundland based company that has entered into a number of contracts with CPC to provide both CUS and HS services in the Atlantic provinces. At the time of the Board's proceedings, RMS Pope was party to 14 HS and 9 CUS contracts with CPC in Atlantic Canada; the majority of which are in Newfoundland. The largest contract RMS Pope currently holds with CPC is a CUS contract for Cape Breton that it won in 2010. The Board was advised that the Cape Breton CUS contract is one of the largest CPC contracts in Atlantic Canada, encompassing 11 routes serving Sydney, North Sydney, Glace Bay and New Waterford. In addition to its work for CPC, RMS Pope engages in property rentals, video equipment maintenance and landscaping/snow removal. Its work for CPC represents between 40 and 60% of its business. RMS Pope employees performing HS and CUS work in Newfoundland are not unionized, while those in the remaining Atlantic provinces are members of CUPW.

[12] CUPW is a national trade union. It is the certified bargaining agent for two units of operational employees of CPC, the urban operations unit and the rural and suburban mail carriers' unit. In the late 1990s, CUPW began organizing HS and CUS workers throughout Canada. It was certified to represent a unit of HS and CUS workers employed by RMS Pope in Nova Scotia, New Brunswick and Prince Edward Island in December 2006 (Board order no. 9215-U).

[13] CUPW's application seeks to have CPC and RMS Pope declared to be a single employer for labour relations purposes, pursuant to section 35 of the *Code*.

III–Positions of the Parties

A–CUPW

[14] The union submits that once the five part test established by the Canada Labour Relations Board (CLRB) in *The Canadian Press et al.* (1976), 13 di 39; [1976] 1 Can LRBR 354; and 76 CLLC 16,013 (CLRB no. 60) (*Canadian Press*) and refined in *Murray Hill Limousine Service Ltd. et al.* (1988), 74 di 127 (CLRB no. 699) (*Murray Hill Limousine*) has been met, the Board can exercise its discretion to grant a common employer declaration if it is satisfied that there is a labour relations purpose for doing so. The union asserts that all of the necessary elements exist for such a declaration in this case.

[15] CUPW submits that CPC and RMS Pope are both employers of individuals who perform mail handling functions. CUPW submits that both employers are under federal jurisdiction. The union submits that, under the *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3, the postal service is within the exclusive legislative authority of the Parliament of Canada and therefore CPC, which carries out this function, is a core federal undertaking. The union submits that since RMS Pope's operations are an integral part of the effective operation of CPC, it is also within federal jurisdiction.

[16] The union argues that CPC and RMS Pope are associated or related enterprises based on a number of factors. The union submits that the focus in this analysis is on the operations, rather than the ownership of the enterprises. It asserts that CPC exercises complete control over the operations of RMS Pope; CPC establishes the service requirements and can change them, in its sole discretion, at any time.

[17] The union submits that HS and CUS workers are essential to the smooth functioning of postal operations. CPC insists on strict compliance with the delivery schedules set out in the contracts, because the efficiency of its operations depends on adherence to the time frames it has established. The contractor's operations are thus totally integrated into those of CPC. The union

advises that there were pilot projects in Kelowna and Burlington in the 1990s where CUS work was "contracted in" to CPC and, in those cases, the CUS workers became CPC employees.

[18] The union argues that CUS workers work exclusively for CPC during their shifts and that they are responsible for processing, collecting and delivering the mail and other CPC products. The union argues that the work performed by CUS workers is identical to work performed at other locations by MSCs, who are employees of CPC. The union notes that the only difference between the two is that the MSCs drive CPC vehicles while CUS workers drive vehicles owned by the contractor, RMS Pope. The union further argues that MSCs and CUS workers are both part of the public face of CPC, hence the requirement in RMS Pope's CUS contracts regarding the appearance of CUS workers. Additionally, the union argues that, although MSCs and CUS workers never work together, in some areas the Regional CUS Coordinator also oversees the work of the MSCs.

[19] The union submits that the transition between contractors is seamless when a new contractor takes over a CUS or HS contract. In such cases, the practice is for the new contractor to hire the former contractor's employees. The CUS and HS workers continue to do the same work for CPC, in the same manner, regardless of the identity of the contractor.

[20] CUPW further argues that, in carrying out their duties, CUS workers work either on the road or out of CPC's premises. The union submits that the CPC depot is the central location for pickup, collection and processing of the parcels by CUS workers and that CPC provides a desk at the post office for use by the CUS workers. It states that CUS workers work directly with other CPC employees and have the same access to CPC facilities, such as washrooms, lunchrooms, buildings and keys, as do CPC employees. It suggests that CUS and HS workers are invited to CPC events.

[21] The union suggests that CUS workers use CPC's equipment for the sorting and processing of mail and parcels. The union submits that CUS workers routinely identify themselves as CPC employees, that CPC has provided the contractors with signs for their vehicles that include the CPC logo and that some CUS workers wear CPC uniforms. The union also submits that CPC has exclusive use of RMS Pope's vehicles, since RMS Pope does not use them for any work other than that undertaken by the CUS and HS workers.

[22] The union submits that CPC exercises extensive control and direction over RMS Pope and its operations. It argues that the jurisprudence does not require that there be total control and direction. Rather, it is sufficient that the policies of the two enterprises are coordinated, integrated and subject to common direction.

[23] The union argues that CUS workers must comply with all of the requirements of the *CPC Act* and its regulations. It points out that the policies set out in CPC's Corporate Manual System ("CMS") apply to both enterprises, demonstrating CPC's close control and direction over CUS and HS workers on a daily basis. Specifically, the union argues that CPC's policies and procedures regarding dress codes, money handling, customer service, mail security and protocol for mail delivery apply to CUS workers. Furthermore, the union argues that the CMS, which is not provided to RMS Pope, is an essential tool in the supervision of work done by CUS and HS workers.

[24] It also argues that the route schedule contained in the contracts demonstrates the extent of CPC's rigid control and direction, given how detailed they are and the fact that CPC imposes these terms and can change them unilaterally. Although CPC expects contractors to have a lead hand or manager available at all times, if they are not, CPC management deals directly with the contractor's employees. The union points out that RMS Pope does not have any full time management presence at any of its locations outside Newfoundland and has only one part time supervisor in Cape Breton. The union submits that there are daily interactions between CUS workers and CPC managers. CPC sets the requirements for the vehicles to be used by CUS workers as well as the level of insurance coverage required. CUPW alleges that CPC's Regional CUS coordinator inspects the CUS worker's vehicles and has the discretion to remove them from service.

[25] CUPW also argues that, since CPC managers tender the parcels to the CUS workers through the RMS Pope onsite manager, CPC ultimately controls the flow of work and thus has a direct impact on the workload and wages of the CUS workers. The union further argues that the CPC managers have the same control over CUS workers as they exercise over MSCs and letter carriers. CPC officials can direct CUS workers to complete extra work and can restructure CUS workers' daily schedules as they see fit. The local CPC managers are the direct point of contact

between CPC and RMS Pope employees. The union also argues that CUS workers are required to take any training mandated by CPC.

[26] The union submits that CPC supervisors are present on site daily and that they set the time limits for the delivery of the CUS workers' relay bags. Additionally, the union states that the Regional CUS coordinator, who is a CPC official, has control over the contract and performs onsite audits to ensure that CUS workers comply with CPC policies and procedures. The union asserts that CPC monitors the work performance and customer complaints relating to the CUS workers, provides RMS Pope with quality assurance reports regarding the CUS workers and advises of any complaints made regarding their work. The union suggests that CUS workers are subject to discipline by CPC for failing to meet its service requirements. The union submits that CPC has a high degree of control over the discipline of a contractor's employees.

[27] CUPW relies on *Muir's Cartage Ltd. and Canada Post Corporation* (1992), 89 di 12; 17 CLRBR (2d) 182; and 92 CLLC 16,060 (CLRB no. 955) (*Muir's Cartage*); and *S.V.N. Enterprises Ltd., doing business as S & K Trucking*, 2003 CIRB 219, for the proposition that RMS Pope, like the contractors in those cases, is associated or related to CPC and that it and CPC are under common control or direction.

[28] The union submits that a common employer declaration is justified by a labour relations purpose in this case. It submits that section 35 of the *Code* is not just remedial in nature, and that the Board's discretion should be exercised so as to promote the objectives of the *Code*, including the protection of bargaining and bargained rights (citing *Landtran Systems Inc.*, 2002 CIRB 170 (*Landtran*)).

[29] The union states that it has difficulty negotiating collective agreements with CUS and HS contractors such as RMS Pope because those employers claim that CPC's strict tendering guidelines prevent them from improving wage rates or working conditions. Contractors who find themselves losing money on their CPC contract can terminate that contract on short notice and walk away from their collectively bargained obligations to their employees. The union argues that it has little ability to negotiate improvements in wages, benefits and working conditions under these circumstances. The union submits that a common employer declaration is necessary

to enable it to bargain directly with the entity that controls the funding for improvements to the terms and conditions of these workers' employment, namely CPC.

[30] The union alleges that, historically, CUS contracts are not renewed in situations where the workers become unionized during the term of the contract. It submits that, at one time, it had organized some 24 bargaining units of CUS workers, but there are now only four remaining units because the contractors lost their contracts with CPC for various reasons. The union submits that CPC can terminate a contract on 90 days notice and that it need not give a reason. It suggests that unionization of CUS and HS workers has resulted in such contract terminations in the past. The union adduced evidence demonstrating that RMS Pope's contract renewal rate is only 38% in the provinces where it is unionized, significantly lower than its average in Newfoundland, where its employees are not unionized (83%) and the national average (58% for CUS and 70% for HS). The union argues that when CUS and HS contracts are not renewed, the union's bargaining rights are effectively extinguished. The union argues that this results in a violation of the CUS and HS workers' right to freedom of association, as protected by section 2(*d*) of the *Charter of Rights and Freedoms*.

[31] The union argues that, in exercising its discretion to grant a common employer declaration, the Board would be promoting sound labour relations, since the order would prevent the erosion of bargaining rights and enable the union to bargain on behalf of the CUS and HS workers directly with the real employer, CPC. It submits that section 35 of the *Code* must be interpreted in a way that is consistent with the *Charter* and that the Board should exercise its discretion to grant the declaration to ensure that the CUS and HS workers have a meaningful right to collective bargaining.

B–CPC

[32] CPC opposes CUPW's section 35 single employer declaration application.

[33] CPC asserts that it and its predecessor, the Post Office Department, have historically contracted out both HS and CUS work. From CPC's perspective, this method of distributing the work is more economical and cost-effective, as it avoids the need for CPC to maintain a large fleet of vehicles. Tendering is done through an open, competitive process. CPC evaluates the

bids based on multiple factors, including price, ability to provide the required service, vehicles, references and previous experience working for CPC.

[34] CPC asserts that its main concern is to obtain the most competitive price for the particular service required and it is not concerned with whether the successful bidder is an individual, a sole proprietorship, a partnership or a corporation. The CUS and HS contractors commonly employ their own workforces to perform the services specified in their contracts with CPC. These workforces can range from a few workers or family members to large scale operations with employees, owner/operators, lease/operators or a combination of employees and subcontractors. CPC further asserts that the unionization of a bidder is not a factor in CPC's decision to award a contract.

[35] CPC concedes that there are two or more enterprises involved in this application, CPC and RMS Pope, and that they are both employers. CPC takes no position as to whether RMS Pope is within federal jurisdiction. However, CPC submits that its relationship with RMS Pope can be distinguished from earlier cases in which the Board found that the contractors were associated or related to CPC and that the two entities were under common control or direction (see *Muir's Cartage*, *supra*; and *S.V. N. Enterprises Ltd., doing business as S&K Trucking*, *supra*).

[36] CPC argues that RMS Pope's business is distinct from that of CPC and that the two enterprises are not associated or related, nor do they share common control or direction. CPC argues that the essential preconditions for a declaration of common employer are thus not met in this case. CPC also submits that, even if all of the criteria were met, no labour relations purpose would be served by such a declaration as the contractual arrangements it has with RMS Pope are entered into for *bona fide* business reasons and not with the intent of escaping CPC's collective bargaining obligations.

[37] CPC asserts that its relationship with RMS Pope is solely a contractual one, and that CPC does not require RMS Pope or its employees to work exclusively for CPC. RMS Pope is free to do business with whomever it chooses. CPC submits that RMS Pope engages in a number of other businesses, such as snow removal and property rentals, and does not work exclusively for CPC. CPC is but one of RMS Pope's clients, and CPC's work represents only forty to sixty per cent of RMS Pope's business. CPC submits that RMS Pope is not financially dependent on CPC.

[38] CPC argues that it is not subject to common ownership or management with RMS Pope in any way. CPC has no investment or ownership interest in RMS Pope. CPC maintains that they are separate and independent enterprises, each exercising control over its own affairs. The two companies have completely separate management and governance structures and each controls its own business decisions and operations.

[39] CPC explains that the services to be provided by RMS Pope are set out in the contract. RMS Pope's workers perform a specific set of tasks, distinguishable from the work performed by CPC letter carriers and MSCs. CPC submits that RMS Pope's workers have minimal interaction with CPC employees, normally limited to the exchange of relevant information. CPC argues that it has no control over RMS Pope's employees and does not direct, supervise or monitor their work. CPC states that RMS Pope has sole responsibility for ensuring that its contractual obligations to CPC are met.

[40] CPC submits that RMS Pope employees do not have the same access to CPC buildings and facilities as do CPC employees. RMS Pope employees only have access to the areas of CPC facilities that is required for them to accomplish the contracted work. CPC argues that RMS Pope employees do not use CPC equipment to sort and process lettermail, as this work is done by CPC employees. CPC notes that the contracts require RMS Pope to provide its employees with the required equipment, such as vehicles and cellular phones, at its own expense. The only equipment provided by CPC is the PDT used by CUS workers and the lettertainers, racks and lift jacks used by HS workers.

[41] RMS Pope employees are not provided with CPC identification cards and CPC argues that RMS Pope employees are not permitted to identify themselves as CPC employees. CPC argues that RMS Pope workers do not wear CPC uniforms, although it acknowledges that, in the past, CPC employees have provided RMS Pope employees with CPC shirts and caps. CPC states that it has informed the contractor that it must not use any of CPC's brands, trade-marks or logos and that this prohibition is clearly set out in the contracts. The CUS contracts specify that the contractor's employees must be properly attired in a uniform. As the contractor's employees performing HS work do not have contact with CPC customers, CPC does not require that they

wear a uniform, but does specify that they must comply with CPC occupational health and safety requirements and wear safety shoes and vests while on CPC property.

[42] CPC submits that RMS Pope is responsible for determining how many employees it requires, whether they will work full-time, part-time or on a casual basis, and the schedules of those employees. It states that RMS Pope has considerable discretion as to how it assigns the work. While the specifications with respect to the hours of work are set out in the contracts, CPC only requires that RMS Pope comply with the terms of the contract and that it provide quality service. RMS Pope decides which of its employees will service each specific route.

[43] CPC states that if it is concerned about the performance or conduct of a specific RMS Pope employee or needs to relay an operational instruction to an RMS Pope employee, it communicates with an RMS Pope supervisor. CPC suggests that the circumstances in which a CPC representative would communicate directly with an RMS Pope employee are rare and limited, such as when health and safety are an issue. CPC argues that it will only request the removal of an RMS Pope employee from CPC work in unusual circumstances, such as when there has been serious misconduct or a breach of health and safety requirements. For example, on one occasion CPC became aware that an RMS Pope employee was not clearing letter boxes in accordance with the company's contractual obligations. The matter was brought to the attention of RMS Pope management, who were informed that the individual could no longer be permitted to handle mail. RMS Pope management dealt with the employee directly. In such cases, RMS Pope is free to assign the employee to non-CPC work. CPC also provided an example of a case in Cape Breton in which RMS Pope reassigned pick up locations on two routes in order to accommodate a restriction on one of its employees. CPC was informed of the change so that the PDTs could be reprogrammed, but was not asked for its permission to effect this reassignment. CPC asserts that it is not concerned with which driver does the work, but only that the work is performed in a timely manner.

[44] CPC asserts that it does not provide orientation directly to RMS Pope workers, but will give RMS Pope's management team a brief orientation on the products and services offered by CPC so that they can instruct their employees accordingly. CPC submits that RMS Pope is solely responsible for the training of its employees, but admits that it provides CUS workers with

training on the operation of the PDTs, since this equipment belongs to CPC and it has expert and specific knowledge of their functioning.

[45] CPC submits that the Corporate Manual System that specifies how work is to be accomplished at CPC is intended for and used exclusively by CPC employees. It is accessible only via CPC's internal website, to which contractors do not have access. CPC confirms that its contractors are aware of the content of the various CPC directives for the proper handling of mail, even if they do not have access to the CMS, and are well aware of their responsibilities as a result of the details contained in their contracts. It submits that RMS Pope has its own human resource policies and practices, independent of those applicable to CPC employees. However, CPC indicates that, in order to comply with its statutory obligations, CPC's policies on health and safety apply to every person present on CPC property, including RMS Pope's employees.

[46] CPC denies that the work of the CUS drivers is the same as that of the MSCs employed by CPC. It asserts that 98% of the MSCs do not perform letter carrier support functions, which is one of four key responsibilities of the CUS drivers.

[47] CPC admits that the contracts set out detailed requirements regarding the vehicles that are to be supplied by the contractor. CPC submits that this allows it to properly plan for fuel expenses. RMS Pope must adhere to these terms and must ensure that its workers are properly licensed to operate the vehicles. CPC indicates that RMS Pope is responsible for all maintenance on its vehicles and is permitted to use the vehicles for other purposes when they are not required for CPC work. CPC does not permit RMS Pope to park its vehicles on CPC property overnight, although in at least one location, RMS Pope leases property adjacent to CPC facilities for its vehicles. CPC indicates that the ban on the use of CPC's logo applies to RMS Pope's vehicles. While, at one time, CPC encouraged contractors to identify themselves as proud suppliers to CPC, this policy was changed some years ago. Contractors have been requested to remove such signage from their vehicles.

[48] CPC argues that no labour relations purpose would be served by making a single employer declaration. It submits that section 35 of the *Code* is intended to preserve existing bargaining rights, not to enable a union to expand its rights outside of the normal organizing process. CPC

submits that, in this case, a single employer declaration is not required because CUPW's bargaining rights are not at risk.

[49] CPC submits that the union has an effective bargaining relationship with RMS Pope. It has negotiated two successive collective agreements with RMS Pope, including one that is currently in force in which the union claims to have made significant gains. CPC suggests that, when a contractor has committed to a price for a five year contract with CPC, it may have limited flexibility to negotiate improvements to a collective agreement. However, this is a commercial reality and is not a matter that section 35 of the *Code* was designed to address.

[50] CPC insists that it does not take into account whether a bidder is unionized or not when it awards a contract. It submits that RMS Pope has been the successful bidder for a number of CPC contracts since CUPW organized its employees, including the large contract in Cape Breton. CPC suggests that, since RMS Pope is a Newfoundland based company, it is not surprising that it wins more contracts in Newfoundland than elsewhere in the Atlantic region. Although CUPW's evidence was that 20 of the 24 CPC contractors throughout Canada it had organized subsequently lost or gave up their CPC contracts, CPC suggests that this evidence is too small a sample from which to draw conclusions. It states that in all of the cases identified by CUPW, it was not CPC's decision to terminate the contract. In 10 cases, the contractor did not bid for renewal of its contract and in five cases the contractor lost the bid to a competitor. It also points out that CUPW's evidence does not reflect the experience of other unions.

[51] CPC argues that CUPW has an effective and functioning bargaining relationship with CPC and that there has been no evidence adduced to demonstrate that there has been any loss of bargaining unit work at CPC as a result of the employer's historical contracting out of CUS and HS work. CPC indicates that the contracting-in of CUS work in Kelowna and Burlington was the result of union-management co-operation in those locations.

[52] With respect to CUPW's *Charter* argument, CPC argues that section 2(*d*) does not guarantee a right to collective bargaining nor does it guarantee a specific result from collective bargaining. It suggests that the *Charter* also does not require that every case be decided in favour of the union. CPC asserts that the *Code* already reflects *Charter* values, and must be interpreted

in a manner that balances the respective rights of the parties (citing *Plourde* v. *Wal-Mart Canada Corp.*, 2009 SCC 54).

IV–Analysis and Decision

A–Criteria for a Section 35 Declaration

[53] The Board has established well known criteria that must be met before it will consider making a declaration of single employer under section 35 of the *Code* (see *Murray Hill Limousine*, *supra*):

1. that there be two or more enterprises (businesses);
2. both under federal jurisdiction;
3. that are associated or related;
4. of which at least two, but not necessarily all, are employers; and
5. which are under common control or direction.

[54] Even when the Board finds that these five criteria have been met, it has discretion as to whether a declaration of single employer should be issued. In *S.V.N. Enterprises Ltd., doing business as S & K Trucking*, *supra*, the Board set out the principles that inform its decisions as to whether a labour relations purpose would be served by a single employer declaration:

> [54] The Board will only grant a declaration under section 35 if the declaration will serve a labour relations purpose. The Board's decision in *Air Canada et al.* (1989), 79 di 98; 7 CLRBR (2d) 252; and 90 CLLC 16,008 (CLRB no. 771) provides useful guidance when considering whether a labour relations purpose would be served by a single employer declaration:
>
> > The purpose of section 35 has always guided the exercise of the Board's discretion in these matters. That purpose is aimed at preventing the undermining or evading of bargaining rights through corporate or business arrangements (see *British Columbia Telephone Company and Canadian Telephones and Supplies Ltd.*, *supra*; and *Beam Transport (1980) Ltd. and Brentwood Transport Ltd.* (1988), 74 di 46 (CLRB no. 689)).
> >
> > Section 35 is not aimed at enhancing existing bargaining rights (*British Columbia Telephone Company and Canadian Telephones and Supplies Ltd.*, *supra*). Its purpose is remedial in nature. It is designed to ensure that employers only distinct in appearance do not succeed in circumventing their obligations under the *Code* by resorting to corporate restructuring or other types of business arrangements:

> "... It was, after all, to prevent a management from escaping collective bargaining obligations owed under one corporate entity by transferring work to another controlled entity that Parliament put section 133 [now section 35] into the statute. ...
>
> (*Bradley Services Ltd. et al.* (1986), 65 di 111; 13 CLRBR (NS) 256; and 86 CLLC 16,036 (CLRB no. 570), pages 126; 272; and 14,432)"
>
> Section 35 is not aimed at exempting a bargaining agent from having to organize an otherwise genuinely distinct group of employees. In some cases, the issuance of a declaration by the Board may have that effect, but that is not its purpose. When the Board addresses the issue of discretion, **the question ceases to be whether common control exists; it becomes whether common control contributes to the erosion of bargaining rights**.
>
> (pages 118-119; 271; and 14,098; emphasis added)

[55] Thus, it is clear that the main purpose of section 35 is to deal with complex corporate arrangements that conceal the true relationship between a business and those who work for it. While the Board has used this provision to rationalize a bargaining unit structure in order to prevent disruption caused by inter-unit conflict (see, for example, *Air Canada*, 2000 CIRB 78), preventing the erosion of bargaining rights remains the primary purpose of this provision.

B–Application of the Criteria to the Facts of this Case

[56] In the instant case, the Board is satisfied that there are two or more enterprises, namely CPC and RMS Pope. As a federal Crown corporation, CPC is subject to the *Code*. The Board was advised that CPC has no ownership or other financial interest in RMS Pope. No evidence was provided regarding RMS Pope's corporate structure, but the Board was informed that the company engages in activities other than its work for CPC. The evidence suggests that, as a practical matter, the vehicles used by RMS Pope to fulfill its contracts with CPC are not used for any other purpose. Based on the information available, the Board finds that RMS Pope's work for CPC is severable from its other activities. The Board also finds that this work, which is directly involved in the collection and distribution of mail, is integral to the functioning of CPC's postal operations network. The Board therefore finds that the activities in which RMS Pope engages as a result of its contracts with CPC are within the federal jurisdiction over postal services and that the business is subject to the *Code* with respect to these activities.

[57] There is no dispute that CPC is an employer. In *CPC 635*, *supra*, the Board held that the wording of section 13(5) of the *CPC Act* does not prevent mail contractors from being found to be employers with respect to their own employees. The evidence before the Board in this case clearly demonstrates that RMS Pope is an employer with respect to the individuals that it hires to accomplish the tasks set out in its contracts with CPC. Accordingly, the Board finds that both CPC and RMS Pope are employers within the meaning of the *Code*.

[58] In *Canadian Press*, *supra*, the CLRB provided the following guidance as to the factors to be considered in determining whether two enterprises are associated or related:

> ...To be considered is the degree of interrelationship of the operations of the various enterprises. Do they provide similar services and product? Are they part of a vertically integrated process whereby one business carries out one function, for example, mining ore, and another business, in the organization, processes it? In determining whether the companies are associated or related, the Board would also look into what extent ownership or management of the enterprises are common.
>
> (pages 45; 359; and 441)

[59] In *Muir's Cartage*, *supra*, the CLRB held that common ownership is not required for a finding that two enterprises are associated or related. It is sufficient if the businesses are interrelated and complementary. In that case, the CLRB found that both CPC and its contractor, Muir's Cartage Ltd., were, to different degrees, elements of a single, totally integrated postal service. In this case, the Board has found that RMS Pope's activities under its contract with CPC are integral to the operation of CPC's postal operations network. The evidence before the Board is that RMS Pope's activities are very closely co-ordinated with those of CPC. As was the case with Muir's Cartage Ltd., RMS Pope's activities are an element of a single, totally integrated postal service. Accordingly, the Board finds that RMS Pope's operations are associated or related to those of CPC.

[60] The final criteria for a section 35 declaration is whether the two employers are subject to common control or direction. With respect to this criteria, the CLRB observed in *Canadian Press*, *supra*:

> An indication of the fact that the enterprises are related is not necessarily decisive. Two or more enterprises may have common shareholders and the ownership of the assets may be held in common. However, the companies themselves may function as distinct, autonomous units. A more decisive test is the extent of common direction or control. The Board does not require total commonality of control

> in that all the enterprises are controlled by the same group of individuals. There may very well be a breakdown of functions whereby different persons have different responsibilities and play different roles in each of the companies involved or possibly no role at all in one or more of the companies. If it is established however, that the policies of the various enterprises are closely co-ordinated, integrated and subject to joint direction, even though the individuals are not directly tied to all of the companies involved, this would appear to show common direction and control.
>
> (pages 45; 359; and 441)

[61] In *Murray Hill Limousine*, *supra*, and *Muir's Cartage*, *supra*, the CLRB held that it is the activities that must be under common control or direction, and not necessarily the employers themselves. The Board has distinguished between common direction, which relates to day to day operational activities, and common control, which considers indicia of longer term integration such as ownership, financial links and/or the setting of strategic direction. For the purposes of section 35 of the *Code*, it is sufficient that either common direction or common control be found to exist. In *Muir's Cartage*, *supra*, the CLRB found that common direction existed in the case of a contractor that provided mail sorting and delivery services under CPC's strict supervision. However, the Board has also held that necessary co-operation does not mean that two businesses are under common control (see *Saskatoon Airport Authority*, 2005 CIRB 340). The mere fact that the contract governing the relationship between the two employers contains detailed direction as to how and when the work is to be performed is, in and of itself, insufficient to prove common control or direction. The Board must look at the details of the actual relationship between the parties.

[62] At the time of the Board's proceedings, RMS Pope held a total of 14 HS and 9 CUS contracts with CPC. Although these contracts are very detailed, this level of detail is necessary in order to co-ordinate the activities required for efficient operation of the postal service. With respect to all matters other than those prescribed by its contracts with CPC, RMS Pope operates its business independently and without reference to any of CPC's employment policies, strategic plans or other business planning tools. As a result, the Board is unable to find that the two companies are under common control.

[63] The HS workers employed by RMS Pope operate relatively independently. They have access to the CPC facilities and perform their work without any direct supervision by RMS Pope or CPC. In the event CPC is not satisfied with an HS worker's performance, it contacts RMS

Pope management, who deal with the HS worker directly. Based on the evidence provided, the Board is unable to find that there is common direction with respect to the day to day operational activities related to highway services.

[64] The parties disagree over whether the CUS workers employed by RMS Pope perform the same work as MSCs employed by CPC. The Board was provided with the job description for an MSC and extensive testimony as to the various functions performed by CUS workers and MSCs. The Board was also informed that CUS workers and MSCs never work in or from the same facilities; in other words, the necessary tasks are undertaken either by an MSC employed by CPC or, in the locations covered by its CUS contracts, by RMS Pope's employees. On the basis of this evidence, the Board is satisfied that the functions of MSCs and CUS workers are sufficiently similar to find that they are engaged in a common activity.

[65] The evidence demonstrates that RMS Pope provides very little on-site supervision of the employees who perform the CUS work. Due to the nature of that work, there is consequently daily interaction between the CUS workers and CPC supervisors. On occasion, for example when letter carrier volumes are so great that they cannot deliver the A.M. priorities, CPC supervisors may assign the work to CUS drivers. CPC supervisors complete a count of all items assigned to the CUS drivers for delivery. CPC supervisors may contact a CUS driver by cell phone during the work day to check on the timing of deliveries. In the Board's view, the totality of the evidence regarding the nature of the CUS work and the degree of interaction between CPC supervisors and the RMS Pope employees performing this work is sufficient to conclude that common direction exists.

C–Labour Relations Purpose

[66] As noted above, the primary purpose of section 35 of the *Code* is to prevent an employer from using its corporate structure to avoid its collective bargaining responsibilities, for example, by shifting work from a unionized entity to one that is non-union. Essentially, this provision of the *Code* allows the Board to lift the corporate veil in order to determine whether rights granted under the *Code* are being defeated by illegitimate employer actions. A labour relations purpose has been found to exist, for example, when an employer contracted out a portion of its unionized business through a franchising agreement while retaining significant control over the

franchisee's operations (see *Coopérative des travailleurs routiers, Trans-Coop, et al.* (1996), 101 di 159 (CLRB no. 1170)) and when an employer contracted out work it had previously done in-house to a contractor that was wholly dependent on the contracting entity (see *Bernshine Mobile Maintenance Ltd.* (1984), 56 di 83; 7 CLRBR (NS) 21; and 84 CLLC 16,036 (CLRB no. 465)).

[67] CUPW invites the Board to expand the scope of application of section 35 beyond its historical interpretation. It points to the Board's decision in *Landtran, supra*, for the proposition that section 35 is not merely remedial and should be interpreted so as to promote the objectives of the *Code*. In this case, CUPW suggests that there are two important factors supporting a finding that there is a labour relations purpose for a declaration of common employer as between CPC and RMS Pope. Firstly, it alleges that mail contractors that are unionized are less likely to obtain or retain CPC contracts and that the employees' *Charter* right to collective bargaining is thwarted when a contract is terminated. Secondly, CUPW asserts that, for bargaining to be meaningful, it needs to be able to negotiate directly with the contracting authority.

[68] In *Landtran, supra*, the Board was dealing with some twenty four companies who were part of, or in some way associated with, Landtran Systems Inc. (the Landtran Group). With respect to the four companies operating within the Landtran Group's domestic less-than-truckload (LTL) division, the Board held as follows:

> [38] At the end of the day, the Board was left with the conclusion that the **corporate boundaries that exist between the entities in the Canadian LTL group are artificial and virtually indistinguishable from a functional perspective**. Although the different companies may have a separate historical and geographical base - and they may well have complemented each other following the integration of the businesses after the purchase of BTL in 1990 - in light of the functional restructuring, it no longer makes sense to maintain the artificial distinctions between companies within the Canadian LTL segment. And, it no longer makes practical labour relations sense to have two unions and a non-union company operating within that same segment of the business.
>
> ...
>
> [48] Even leaving aside the issue of whether bargained or bargaining rights are - or are likely to be - jeopardized, in the circumstances of the present case, it is untenable that two trade unions should represent two separate common employers in the same division of the employer's operation. It simply does not make labour relations sense, nor does it represent a rationalization of bargaining units which would promote sound labour relations and/or which would help to prevent disruption caused by inter-unit conflicts.

> [49] The employer's restructuring of its overall business along new functional lines has dictated the need for a rationalization of bargaining units within the now fully integrated and delineated LTL segment of the network.
>
> (emphasis added)

[69] The Board went on to deny the portion of the union's application that sought to sweep all of the other Landtran Group companies into a common employer, stating:

> [82] Even considering the broader and more expansive interpretation of the Board's discretion under section 35 - and the resultant criteria of what constitutes an appropriate labour relations purpose for issuing a common employer declaration - a common employer declaration over the remaining network of companies would not serve to promote harmonious labour relations. **A common employer declaration - beyond that within each of the LTL and FTL segments - would, in these circumstances, be tantamount to expanding the unions' existing bargaining rights.**
>
> (emphasis added)

[70] In the Board's view, although *Landtran*, *supra*, suggested that the exercise of its discretion under section 35 of the *Code* need not be remedial alone, the decision merely reaffirms that the promotion of harmonious labour relations, as mandated in the *Preamble* to the *Code*, remains the overarching principle informing the interpretation and application of the statute.

[71] In the instant case, the corporate boundaries between CPC and RMS Pope are not artificial or indistinguishable from a functional perspective, as was the case in *Landtran*, *supra*. The imperatives that led the Board to make a common employer declaration in that case are simply not present in the current matter. The evidence before the Board indicates that RMS Pope has had a number of contracts with CPC, beginning in at least 2000. It was successful in obtaining such contracts even after CUPW unionized part of its workforce in 2006. Between 2005 and 2012, RMS Pope was the successful bidder in 37 of 55 tenders issued by CPC in Atlantic Canada. Seventeen of these contracts were in Nova Scotia, New Brunswick or Prince Edward Island and 20 were in Newfoundland. Over the same time period, RMS Pope lost 18 of the tendered contracts for which it was the incumbent contractor. Sixteen of the 18 it lost were in Nova Scotia, New Brunswick or Prince Edward Island. CPC's evidence was that, in the cases where RMS Pope lost a contract, it was because a competitor submitted a lower bid and not because RMS Pope's employees were unionized.

[72] It is a commercial reality that non-union contractors are often able to under-bid unionized contractors. It is also a commercial reality that contracts for service that provide for a fixed price, rather than a flow-through of costs (cost plus), often result in little or no flexibility for the negotiation of improvements in employee wages, benefits and working conditions during their term. However, the legitimate retendering of contracts for service is not a circumstance that section 35 of the *Code* was designed to address. Parliament has provided an alternative solution to the problems caused by successive contracts for services in section 47.3 of the *Code*. While that provision currently only applies to contracting out for pre-board security screening services, the Governor in Council has authority to extend the application of this provision by designating other services, in other industries, by means of regulations.

[73] In this case, the Board is unable to conclude that the contracts with RMS Pope have been used by CPC to undermine CUPW's bargaining units or bargaining rights at CPC. There is no evidence that the work of unionized CPC employees has been transferred to lower paid unionized employees of RMS Pope or that CPC engages in the contracting out of its HS and CUS work in order to avoid its obligations under the *Code*. The Board is satisfied that CPC's tendering process is designed to accomplish a legitimate business purpose and does not have, as its objective or effect, the nullification of rights granted to any employees by the *Code*. The employees of RMS Pope remain entitled to organize and bargain collectively, even if their employer does not have the same financial capacity as CPC. The union has not persuaded the Board that a common employer declaration would promote harmonious labour relations, either in respect of its relationship with CPC or with RMS Pope.

[74] The Board can also find no merit in the union's argument that the guarantee of freedom of association contained in section 2(*d*) the *Canadian Charter of Rights and Freedoms* requires the Board to provide RMS Pope's employees with enhanced bargaining power by means of a declaration of common employer. Although the Supreme Court of Canada's decision in *Plourde v. Wal-Mart Canada Corp.*, *supra*, dealt with the interpretation of the Quebec *Labour Code*, R.S.Q., c. C-27, the observations of the majority of the Court are equally applicable to the *Code*:

> [56] The appellant's argument extends the reasoning in *Health Services* well beyond its natural limits. In that case the state was not only the legislator but the employer. Here the employer is a private corporation. Section 3 of the *Code* guarantees the right of association to workers in Quebec. Other provisions implement this general guarantee. **The legislature has crafted a balance between the**

rights of labour and the rights of management in a way that respects freedom of association. No argument was raised by the appellant or any of the interveners against the constitutionality of *any* provisions of the *Code*, or claimed that in its entirety the *Code* fails to respect freedom of association. The appellant says the interpretation of the *Code* should be developed to reflect "*Charter* values", but **the entire *Code* is the embodiment and legislative vehicle to implement freedom of association in the Quebec workplace**. The *Code* must be read as a whole. It cannot be correct that the Constitution requires that every provision (including s. 17) must be interpreted to favour the union and the employees.

[57] Care must be taken not only to avoid upsetting the balance the legislature has struck in the *Code* taken as a whole, but not to hand to one side (labour) a lopsided advantage because employees bargain through their union (and can thereby invoke freedom of association) whereas employers, for the most part, bargain individually.

(emphasis added)

[75] As noted above, the *Code* contains alternatives to a common employer declaration under section 35 that are intended to address the economic consequences of the contract tendering system. The Board therefore declines to extend the concept of "labour relations purpose" under section 35 of the *Code* to encompass the notion that a contractor's employees should be fully insulated from the normal consequences of contract tendering and retendering.

[76] For all of the reasons set out above, the Board finds that there is no labour relations purpose necessitating a declaration of common employer as between CPC and RMS Pope. The union's application under section 35 of the *Code* is therefore dismissed.

[77] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

Patrick Heinke
Member

Norman Rivard
Member